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Supreme Court, U.S.
FILED
SEP 9 1996
CLERK

No. 96-222

In the
Supreme Court of the United States
October Term, 1996

Duane D. Paisley,

Plaintiff-Petitioner,

vs.

City of Minneapolis,

Defendant-Respondent,

Minneapolis Police Relief Association,

Intervenor-Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT MINNEAPOLIS POLICE RELIEF ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner waived whatever rights he may have had under the Veterans' Reemployment Rights Act, 38 U.S.C. §§ [4321]2021 et. seq., when he resigned from the Minneapolis Police Department in December 1985 and elected to pursue a full-time military career with the Minnesota National Guard.

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STATEMENT OF THE CASE

Petitioner commenced this action against Respondent City of Minneapolis ("City") on September 1, 1994, seeking a declaration of his right to reemployment by the City as a police officer under the Veterans' Reemployment Rights Act ("Act"), 38 U.S.C. §§ [4321] 2021 et seq., with attendant seniority and benefits, including pension benefits, accruing from 1980. Respondent Minneapolis Police Relief Association ("Association") intervened as a defendant in opposition to the relief sought.

The district court granted summary judgment to the City and the Association, concluding that Petitioner had waived his rights under the Act. [Pet. App. A-10 - A-22.] Petitioner appealed the waiver issue to the Eighth Circuit; the City and the Association cross-appealed the issue of Petitioner's eligibility for reemployment under the Act. The Eighth Circuit affirmed the lower court's decision that Petitioner had waived any rights he may have had to reemployment, but declined to address the issue of Petitioner's eligibility under the Act. [Pet. App. A-2 - A-9].

The Association is a Minnesota non-profit corporation whose members include both active and retired City police officers. The Association pays service or dependency pensions to its retired members or their surviving spouses or dependent children as required by state law and the Association's bylaws.[1]

Petitioner began work as a police officer with the City in 1973, and thereby became a member of the Association. In late 1979, Petitioner requested and was granted a two-year leave of absence from City employment to go on active duty

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[1] Under Minnesota law, the Association is statutorily responsible for the payment of pensions to City police officers hired before June 16, 1980.

with the Minnesota National Guard.[2] Petitioner subsequently requested, and the City granted, two additional two-year extensions of his military leave, extending to January 1986.

In October 1985, Petitioner asked the City for an additional three-year extension of his leave of absence and also requested permission to take a police department promotional exam while on leave.[3] The City denied both requests, and, on December 15, 1985, Petitioner resigned from the police department.[4] Petitioner could have returned to the department at that time, but instead chose to continue his voluntary, full-time duty with the National Guard. Petitioner remained on active duty with the National Guard for nine more years, achieving the rank of colonel.

In May 1994, Petitioner was offered early retirement from the National Guard. At that time, he sought reemployment with the City police department. The City denied his request. On August 31, 1994, Petitioner took early retirement from the National Guard and commenced this action against the City.

In his Complaint, inter alia, Petitioner claimed that his years of service with the National Guard must be counted as duty time with the City police department and credited toward a pension from the Association. If he were credited with continuous service from the commencement of his employment as a City police officer in 1973 through his years with the National Guard (1979-94), and if he were reinstated

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[2] Petitioner joined the National Guard in 1965, and essentially served only the required reserve component duty until 1980.

[3] No City police officer has been permitted to take a promotional exam while on a leave of absence.

[4] In connection with his resignation, Petitioner requested and received payment from the Association of the benefits to which he was entitled for his years of service. Petitioner made contributions to the Association's pension fund while employed as a police officer (1973-79), but made no contributions during his military leave of absence (1980-85).

to City employment as requested, Petitioner would be eligible for retirement from the City and a pension from the Association immediately upon reinstatement. [R. Ass'n. App. A-2][5]

REASONS FOR DENYING THE PETITION

I. THE PETITION DOES NOT MEET THE CRITERIA OF RULE 10.

Petitioner makes no effort to meet any of the compelling reasons for review enumerated in Rule 10, claiming instead that the Eighth Circuit's decision "decided an important federal question" which conflicts with this Court's decision in King v. St. Vincent's Hospital, 502 U.S. 215 (1991). [Pet. 7] The Eighth Circuit did not decide a federal question, however. It decided an issue of common law waiver. Nor is its decision in conflict with King, a conflict which would not be sufficient under Rule 10, even if it existed. As the Eighth Circuit noted, "there was no issue of waiver in the King case, so its . . . holding has no bearing on the question of whether a veteran may waive his reemployment rights -- so long as we do not rely on the length of the employee's absence as a basis for finding a clear and unequivocal waiver." [Pet. App. A-7].

Further, the useful life of the King decision ended with the 1994 amendments to the Act. With those amendments "which inter alia limit cumulative leaves of absence for military service

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[5] Assuming twenty-one years of service, Petitioner's annual pension from the Association would be $22,376. Such pension payments to Petitioner, increased by 4% annually as currently provided in Minn. Stat. § 356.215, subd. 4d(b), for Petitioner's assumed life expectancy of 25 years would total $991,552. Petitioner made pension contributions of $7,177 to the Association during his employment as a City police officer from 1973 to 1979. [R. Ass'n. App. A-2—A-3]

to five years in order for the employee to qualify for reemployment rights, 38 U.S.C. § 4312(a)(2) (1994), the holding of King . . . would appear to have only limited, if any, remaining practical significance in cases arising under the Act." [Id., n.4].

The Eighth Circuit's decision is not in conflict with a decision of this Court, and applies only a properly stated rule of common law. Granting the Petition is therefore clearly not warranted.

II. THE EIGHTH CIRCUIT CORRECTLY HELD THAT PETITIONER WAIVED ANY REEMPLOYMENT RIGHTS UNDER THE ACT.

The Eighth Circuit noted that "reemployment rights under the Act may be waived if the employee does so 'clearly and unequivocally'." [Pet. App. A-5, citing Smith v. Missouri Pacific Transportation Co., 313 F.2d 676, 680 (8th Cir. 1963)]. The court then correctly held that Petitioner had clearly and unequivocally waived his rights, on the undisputed facts.

After three two-year leaves of absence requested by Petitioner and granted by the City, the City denied Petitioner's request for a fourth leave of absence, this time for three years. Petitioner could have left the National Guard at that point, and returned to work as a City patrolman. Instead, Petitioner submitted his letter of resignation to the City, in which he said: "Though I am disapointed [sic] to leave the department at this time, I am very appreciative of the support that I have been given and the opportunity I have had to accept several challenging assignments in the military." [Pet. App. A-5.] He also requested and received a refund from the Association of the pension benefits to which he was entitled.

Thus, the Eighth Circuit held, Petitioner "voluntarily extended his active duty with the National Guard" and

"voluntarily resigned from the police department in 1985." [Pet. App. A-6.] Petitioner's failure to pursue his claims under the Act at that time demonstrates that he had no real intention of pursuing a career in the police department, but rather intended to enjoy a career with the National Guard. "Given the choice, he elected to make his career with the military." [Id.] And he did so. Petitioner remained in the National Guard until he was offered early retirement nine years later, in 1994. Only then, when he chose to bring his military career to an end, did Petitioner seek to assert rights under the Act. Petitioner had long since waived any statutory reemployment rights, however, in 1985, when he "opted for a military career rather than a career with the police department." [Id.]

CONCLUSION

The Association respectfully requests that the Petition be denied.

Date: September 6, 1996

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Affidavit of Gerald R. Bridgeman A-1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Duane D. Paisley,

Plaintiff,

v.

City of Minneapolis,

Defendant,

Minneapolis Police Relief Association,

Intervenor.

File No. 3-94-1051

AFFIDAVIT OF
GERALD R. BRIDGEMAN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Gerald R. Bridgeman, being sworn on oath, deposes and states:

1. I am the Secretary and Director of the Minneapolis Police Relief Association, the Defendant Intervenor in the above-captioned action. The Association is a Minnesota non-profit corporation whose members include both active and

retired members of the Minneapolis Police Department. The Association pays its retired or disabled members, or their surviving spouses or dependent children, service, disability, or dependency pensions in such amounts and in such a manner as is provided by law or by the Bylaws of the Association. The Association was created by an act of the state legislature and is the entity statutorily responsible for the payment of pensions to police officers hired before June 16, 1980.

2. The Association is funded through contributions from its members and taxes from the state and city governments.

3. The Plaintiff Duane Paisley was hired by the City of Minneapolis as a police officer on June 4, 1973. Paisley contributed to the pension fund until he took a leave of absence on January 26, 1980, after which he made no further contributions to the fund. Paisley was on leave of absence from January 28, 1980 through December 15, 1985. on December 15, 1985 he resigned from the police department.

4. At his request, on February 14, 1986, Paisley was paid $600.00 by the Association for six years of completed service pursuant to Minn. Stat. § 423.745, subd. 2 (this law has subsequently been amended, repealed and recodified).

5. I understand that in this litigation Paisley is asking that all of his service in the military be counted as duty time and credited to his pension. If Paisley were credited with service from June 4, 1973 to January 1, 1995, he would earn 21 years of service which would entitle him to a pension of 35.6/80 of the salary of a top patrol officer, or $1,864.73 per month. Paisley would be eligible to retire immediately if the court grants his request. The pension is escalated in a ratio to the top patrol salary of a Minneapolis police officer, and the

escalation is 4% annually pursuant to Minn. Stat. § 356.215, subd. 4d(b).

6. If Paisley began drawing a pension on January 1, 1995 of $22,376.76 per year, the escalated payment pursuant to statute throughout his assumed life expectancy (an additional 25 years), would total $991,552.65 by the year 2020.

7. The financial impact on the Association if Paisley is included as a retirant on January 1, 1995 is staggering. According to the Association's actuaries Gabriel, Roeder, Smith & Company, the increase in the Association's unfunded actuarial accrued liabilities for Paisley would be $420,800, and for his surviving spouse would be an additional $80,500. The increase in the annual amortization payment to amortize the unfunded liabilities until the year 2010 would be $42,100 for Paisley and $8,000 for his surviving spouse.[1] Currently, the Association does not have assets to cover this liability. Should Paisley be included in the plan, city contributions to the plan would have to be increased.

8. Paisley contributed a total of $7,177.25, less the $600.00 rebate to him in 1986, for a total contribution to the fund of $6,577.25.

YOUR AFFIANT SAYS NOTHING FURTHER.

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[1] The value of the survivor benefit is based on the average cost of survivor benefits for the plan as a whole because the Association does not have the date of birth of Paisley's spouse.

s/s
Gerald R. Bridgeman

Subscribed and sworn to before
me on January 23, 1995.

/s/ Renee E. Tessier
Notary Public